

special order for 11 o'clock A. M. on Saturday next.

Senator Allison offered the following resolution:

Resolved, That, in future, the Senate will consider no bill to incorporate a railroad company, until it has been printed by the parties presenting it, and copies placed on the desks of Senators.

Senator Flanagan moved to lay the resolution on the table. Lost by the following vote:

Yeas—Senators Culberson, Flanagan, Parker and Swift—4.

Nays—Senators Allison, Ball, Baker, Bradshaw, Camp, Davenport, Dillard, Dwyer, Ellis, Erath, Friend, Hobby, Ireland, Leebetter, Morris, Moore, Randle, Russell, Stirman and Westfall—20.

Absent, not voting—Senators Bradley, Trolinger and Wood.

On motion of Senator Ireland, the resolution was then adopted.

Senator Flanagan offered the following resolution:

Resolved, That the sergeant-at-arms be required to have the cistern belonging to the State House cleaned out and prepared to receive water.

Adopted.

Senator Culberson presented the following dispatch from his royal highness, Alphonso Dusuc:

JEFFERSON, TEXAS, February 10, 1874.

To Hon. Culberson and Epperson:

His royal highness, Comus Rex, decrees that you invite the officials and Representatives to the grand carnival on the seventeenth inst.

(Signed)

ALPHONSO DUSUC,

Grand Secretary.

On motion of Senator Ellis, the Senate adjourned to 10 o'clock A. M. to-morrow.

TWENTY-FIFTH DAY.

SENATE CHAMBER.

AUSTIN, February 12, 1874.

Senate met pursuant to adjournment. Roll called; quorum present.

Prayer by the chaplain.

On motion of Senator Ball, the journal of yesterday was not read.

Senator Westfall presented a petition "In regard to line of Burnet and Lampasas." Read and referred to Committee on Counties and County Boundaries.

Senator Swift presented a petition from citizens of Rusk county, in regard to a formation of a new county. Read and referred to Committee on Counties and County Boundaries.

Senator Randle, chairman Committee on Engrossed Bills, made the following report:

Hon. R. B. Hubbard, President of the Senate:

Your Committee on Engrossed Bills beg leave to report that they have carefully examined and compared Senate bill No. 80, "An act to prevent speculations by officers and agents in county, city and town contracts and liabilities," and find the same correctly engrossed.

ED. RANDLE, Chairman.

Senator Stirman, chairman of Committee on State Affairs, submitted the following reports:

Hon. R. B. Hubbard, President of the Senate:

Your Committee on State Affairs, to whom was referred House bill No. 88, "An act to create a lien in favor of the proprietors of livery or other public stables," having carefully considered and examined the same, report it back, with the following amendment, to-wit: amend, by inserting that, "hotel and boarding house keepers have the same lien upon all property or baggage deposited with them," and recommend its passage as amended.

W. B. STIRMAN, Chairman.

Hon. R. B. Hubbard, President of the Senate:

Your Committee on State Affairs, to whom was referred Senate bill No. 84, entitled, "An act to fix the compensation of members of the Legislature," having carefully examined and considered the same, instruct me to report it back, with the recommendation that it be laid on the table.

All of which is respectfully submitted.

W. B. STIRMAN, Chairman.

Hon. R. B. Hubbard, President of the Senate:

Your Committee on State Affairs to whom was referred "the petition for the relief of Wm. C. Crawford," have carefully examined and considered the same, and being of opinion that ample provision is made by the general pension law for all claims of this class, instruct me to report it back with the recommendation that the petition be laid on the table.

All of which is respectfully submitted,

W. B. STIRMAN, Chairman.

Hon. R. B. Hubbard, President of the Senate:

Your Committee on State Affairs, to whom was referred the memorial of J. M. Wilson, "asking the Legislature to purchase certain patents issued to Dr. J. E. Park," have carefully examined and considered the same, and being of the opinion that they have not the power, under the Constitution, to make such purchase; and, even should such power exist, they doubt the propriety of its exercise, your committee, therefore, instruct me to report it back, with the recommendation that it be laid on the table.

All of which is respectfully submitted,

W. B. STIRMAN, Chairman.

Senator Swift, chairman Committee on Claims and Accounts, submitted the following reports:

Hon. R. B. Hubbard, President of the Senate:

Your Committee on Claims and Accounts, to whom was referred Senate bill No. 106, "An act for the relief of A. W. Marchedon, beg leave to report that they have carefully considered said bill, and instruct me to report it back to your honorable body with the recommendation that it do pass.

Respectfully,

W. H. SWIFT, Chairman.

Hon. R. B. Hubbard, President of the Senate:

Your Committee on Claims and Accounts, to whom was referred Senate bill No. 37, "An act to make an appropriation to pay certain *per diem* certificates," having carefully considered the same, instruct me to report it back to the Senate with the recommendation that it do pass.

W. H. SWIFT, Chairman.

Hon. R. B. Hubbard, President of the Senate:

Your Committee on Claims and Accounts, to whom was referred Senate bill No. 135, "An act for the relief of J. P. Williams, sheriff of Wood county," have carefully considered the same, and instruct me to report it back to the Senate with the recommendation that it do not pass.

W. H. SWIFT, Chairman.

Senator Ireland, chairman of Judiciary Committee, submitted the following reports:

Hon. R. B. Hubbard, President of the Senate:

The Committee on Judiciary, to whom was referred Senate bill No. 79, "An act to regulate the conduct of public officers," herewith report substitute for section five, of said bill, and recommend the passage of the bill as amended.

IRELAND, Chairman.

Hon. R. B. Hubbard, President of the Senate:

Your Committee on Judiciary, to whom was referred House bill No. 176, "An act to give effect to the Constitution of the State, as amended, so far as it relates to the Supreme Court," beg leave to report the same back, with the recommendation that it do pass.

IRELAND, Chairman.

Hon. R. B. Hubbard, President of the Senate:

Your committee, to whom was referred House bill No. 99, "An act to repeal 'An act entitled an act to locate the county seat of Trinity county,'" approved May 30, 1873, beg leave to report the same back, with the recommendation that it do pass.

IRELAND, Chairman.

Hon. R. B. Hubbard, President of the Senate:

Your committee to whom was referred Senate bill No. 131, "An act to protect purchasers at sales made by executors and administrators, by requiring deeds in certain cases to be recorded within a certain time," beg leave to report the same back, with the recommendation that it do not pass.

IRELAND, Chairman.

Senator Hobby on the part of a portion

of the Committee on Privileges and Elections, submitted the following report:

Hon. R. B. Hubbard, President of the Senate:

The undersigned members of your Committee on Privileges and Elections, to whom was referred the contested election case of Z. Hunt v. W. M. Burton, ask leave to report that they have had the same under careful and laborious consideration since the date of its reference, and herewith submit a statement of the facts as developed by testimony, together with their views of the law which they deem applicable to the case.

Upon an examination of the evidence in this case we find that in the Thirteenth Senatorial District, composed of the counties of Fort Bend, Wharton, Austin and Waller, at an election held on the second of December, 1873, the number of votes cast in said district for Z. Hunt, the contestant, was 1938. That the number of votes cast at said election for W. M. Burton, the contestee, was 1261; that there were cast for W. Burton 605 votes, and for William Burton 819 votes, also at said election; that it was notoriously known that there were no other candidates for the office of Senator from that district, except Z. Hunt, the contestant, and W. M. Burton, the contestee.

Your committee were unanimously of the opinion, from the evidence, that the votes cast for W. Burton were intended for W. M. Burton, the contestee, and your committee, therefore, added this number, to-wit: 605 votes, to the vote of W. M. Burton, making his vote 1866. Of the remaining 819 votes which were (as appeared from the face of the ballots) cast for William Burton, the evidence shows (see deposition of witness from Waller county) to the satisfaction of the undersigned, that 655 of them were evidently intended for W. M. Burton. This last mentioned number, added to the vote already accorded to W. M. Burton by the committee, would make his vote, 2521; and would give a majority of 583 votes to the contestee, over Hunt, the contestant.

It is agreed by the committee that the evidence before the committee, *de hors* the ballot, shows that the 604 votes polled in Waller county, for William Burton, were intended for W. M. Burton, the contestee. But it is denied by all the committee present, except the undersigned, that it is competent to inquire whether a voter casting a vote for William Burton, intended to vote for W. M. Burton. The question as to the admissibility of evidence extrinsic of the ballot, to show the intention of the voter is the only question which has caused any contrariety of opinion in your committee, and upon the decision of this question alone, the result of this case depends.

If it be determined that it is admissible to show that ballots cast for William Burton, were intended to mean W. M. Burton;

then W. M. Burton is elected by 583 votes, as it is not disputed that the evidence shows this. But if it be held that it is inadmissible to establish this fact by evidence other than the ballot, then in that case Z. Hunt has a majority of 72 votes. If the latter position is true, it results in this, that though the *facts* evidence the intention of the voter (who cast a printed ballot for William Burton) to vote for W. M. Burton. Yet the observance of a legal rule, applied only in *some* courts of justice, is sufficient to control and defeat this intention. No rule has yet been established by judicial decisions as to how far extrinsic evidence is admissible to cure or aid the imperfections of a written or printed ballot. Evidence which may be termed, the surrounding circumstances attending the election—for example, who were the candidates, whether other persons of the same name resided in the district and were eligible in cases where a ballot has been imperfectly printed—are always admissible. (Cooley Const. Lim., 611.)

When the ballot, in connection with such facts as would be provable if it were a case of contract, enables the proper authority to apply it to the candidate entitled to it, it should be done. (Cooley, Const. Lim., 610.)

The highest constitutional privilege under the government is not to be taken away on a mere technicality, but rather the most liberal intendment should be indulged to support the electors' action, whenever the application of common sense rules, which are applied in other cases, will enable us to understand it and render it effectual.

Now it will not be denied that it would be a fact provable in any court of justice in this State, in any case of contract, that William Burton was intended to mean W. M. Burton. If so, by stronger reason such proof ought to be heard, and is admissible in legislative bodies, which are not strictly nor even necessarily governed by any rules adopted by courts, but simply adopt them so far as will, in their judgment, subserve the ends of equity and justice. But the strict letter of our judicial decisions would permit proof, in any case of contract, that William Burton meant W. M. Burton.

It is admitted that if erroneous initials, merely, are to be explained, then it would be legitimate to show the voter's intention by evidence *alimide*, because that is an imperfect ballot, but on the other hand it is contended in the report submitted before this, that where the *christian* name is set forth in full, though it may be incorrect, no evidence is admissible to correct or explain it, and the reason relied upon to support this is, that in the case of the introduction of evidence to correct an incorrect christian name, and to show that it was not the name intended, would be in violation of

the policy of the law which requires an impenetrable veil of secrecy to protect the voter's ballot.

In reply, it could, with as much force, be said that the same policy would be violated whenever evidence is offered to explain or change incorrect initials, and if such evidence would be inadmissible on that ground in the one case, it would assuredly be incompetent in the other. If it be the policy of the law, under our statute, to keep the voter's ballot always, and under all circumstances, a secret, it would certainly be a violation of that policy to explain the ballot in any particular, by any evidence. The numerous cases of contested elections in the courts of justice, and in legislative bodies, in this country, where the ballots were incorrect, and were explained by evidence *alimide*, shows that such an explanation of the ballot was never regarded as a violation of the policy in question. In fact, there is no case where the right to explain or correct error or ambiguity in ballots by other evidence than the ballot has ever been denied.

Our statute unquestionably guarantees the right of the voter to cast his ballot secretly, and with certain exceptions keeps it secret always, but it as certainly contemplates that the ballots in a proper case, shall be investigated with a view of ascertaining how the electors voted. Section thirteen of the election law prohibits under a heavy penalty any examination of the tickets with a view to ascertain how any elector voted, at the time of counting the votes or subsequent to the ballots being received in the box, except as thereafter provided. Section fifteen provides that "after the election the tickets shall be placed in a box and sealed up and deposited with the district clerk, and they are not to be delivered by him to any one, except to some competent authority demanding the same in case of a contest." In the same section the following language occurs: "Any presiding officer, judge or clerk of an election, who shall divulge how any person shall have voted at any election from an inspection of the tickets *unless in a judicial investigation*, shall be deemed guilty of a misdemeanor." This section shows that the secrecy of the ballot is intended to exist only, when an important right, either of an individual or an entire district is not involved. That secrecy is not so sacred that it cannot be violated when the right of 884 voters to express their choice is involved.

This law by necessary implication, authorizes the inspection and investigation of the ballots in such manner as may be deemed proper by the power investigating.

Again, the chief object of the policy of protecting the ballot from public scrutiny is almost entirely accomplished when the vote

is secretly polled and counted in the manner provided by the statute.

It will be observed that the election cases cited in this and the adverse report bearing upon this case have their origin and were determined in courts of justice, bound down by the well established and rigid rules of either statute or common law.

But even then the cases of Attorney General v. Ely, (Fourth Wisconsin,) People v. Ferguson, (Eighth Cowen; Fourteenth Barbour, 259, and Eighth New York Report, 67,) we think, support the view we have taken of the case from a legal stand-point alone. A diligent investigation has not enabled us, so far, to find any decision, going to the extent that if the surname is correct, but the christian name is not (as is the case in the votes of Waller county), that the ballot may not be read by the light of surrounding facts, which clearly show who was the person intended to be voted for. But aside from all judicial decisions in the matter of contested elections in other States, we believe that this Senate, or its committee, being a law unto itself, and higher than, and superior to, any court of justice, does not acknowledge itself bound, by decisions from any court, however much in point they may be, or however able may be the bench from which such decisions emanated.

If the judgment of this sovereign body would be influenced by any judicial construction, it would rather look to the equitable spirit which pervades the practice and decisions of the courts of our own State, as enunciated in the first twenty-eight volumes of our Reports, and from an examination of them none would fail to see that under the broad system of which we are justly proud, the utmost liberality would be indulged in order to ascertain the true interest of any disputed point or purpose.

And it being, in cases like the present, the cardinal rule to ascertain the intention of the voter, the Senate, or the committee acting for the Senate, will not be less liberal than the courts.

The evidence shows that there could not have been in Waller county, when 664 votes were polled for William Burton, any intention to vote for any other than W. M. Burton the contestee, because the mistake was not discovered until late in the day of the election. (See depositions of Waller county witnesses.)

The evidence of the witnesses show that the Waller county vote of 664, for William Burton, was intended for W. M. Burton, and was such a mistake as an ordinary court of equity in a civil case would be justified in granting relief. From the above statement of the facts of this case, as developed by the evidence, and from the view the undersigned take of the law applicable to these facts, their conclusion is, that in

the election mentioned Z. Hunt received 1939 votes, and W. M. Burton received 2521; consequently, that W. M. Burton received a majority of 583 votes.

We therefore recommend the adoption by the Senate of the following resolution:

WHEREAS, At an election held in the Thirteenth Senatorial District, on the second of December, 1873, W. M. Burton received a majority of the votes cast; therefore, be it

Resolved, That the said W. M. Burton is entitled to his seat in the Senate of the Fourteenth Legislature, and that he take the oath prescribed by the Constitution, and be admitted to his seat immediately, and that he be entitled to the *per diem* and mileage allowed by law, from the thirteenth day of January, 1874.

EDWIN HOBBY.

J. H. DAVENPORT.

Report read, one hundred copies ordered printed and made special order for Monday next at 11 o'clock A. M.

Senator Westfall, for Committee on Enrolled Bills, submitted the following report: *Hon. R. B. Hubbard, President of the Senate*:

Your Committee on Enrolled Bills ask leave to report that they have carefully examined Senate joint resolution No. 43, making an appropriation to repair and refurnish the Executive mansion, and find the same correctly enrolled, and have this day at 10:15 A. M. presented the same to the Governor for his approval.

W. H. WESTFALL, for Committee.

Senator Parker introduced a bill entitled "An act authorizing and requiring the issuance of land certificates to certain parties therein named." Read first time and referred to Committee on Private Land Claims.

Senator Morris introduced the following resolution:

Resolved, That the Judiciary Committee be, and they are hereby instructed to define more clearly the offenses of sodomy, adultery and fornication, and report by bill or otherwise.

Adopted.

Senator Moore introduced a bill entitled "An act to amend section four of an act entitled 'An act to provide for the safe keeping and protection of the State house, or so much thereof as may include the public halls, the committee rooms used by the members of the Legislature, and all the books, maps, charts and papers belonging to or appertaining to the library of the State,'" approved May 27, 1873. Read first time and referred to Committee on Public Buildings.

Senator Ireland moved to withdraw Senate bill No. 110, "An act to define the powers of the criminal court in and for the counties of McLennan and Falls." Motion

carried and bill re-referred to Judiciary Committee.

Senator Dillard introduced a bill, entitled "An act to punish returning officers of elections, for refusing to give certificates of election to parties entitled to the same." Read first time and referred to the Judiciary Committee.

Senator Dwyer introduced a bill, entitled "An act to limit the amount to be issued in bonds of the State to the International Railroad Company, and to provide for the payment of the same." Read first time and referred to the Committee on Internal Improvements.

Senator Ireland, chairman Judiciary Committee, by leave submitted the following reports:

Hon. R. B. Hubbard, President of the Senate:

The Judiciary Committee, to whom was referred the memorial of F. W. Johnson praying for an act to authorize and require the Commissioner of the General Land Office to issue a certificate to said Johnson for one labor of land, instruct me to state that such a law would be in violation of the provision of the Constitution lately ratified, prohibiting special legislation. There is now a general bill before the Legislature which will meet the wants of the memorialist.

IRELAND, Chairman.

Hon. R. B. Hubbard, President of the Senate:

The Judiciary Committee, to whom was referred the memorial from Wilson county, praying for an act to allow that county to levy a special tax, instruct me to state that such a law would be in violation of one of the provisions of the Constitution, lately ratified, prohibiting special legislation; there is now a general bill before the Legislature, which will meet the wants of the memorialists.

IRELAND, Chairman.

Senator Allison introduced a bill entitled "An act to regulate the sittings of the several district courts of this State." Read first time and referred to the Judiciary Committee.

The following address to his Excellency Governor Coke, asking the removal of Judge Martin W. Wheeler, of the Fifth Judicial District, presented in the House of Representatives, was ordered spread upon the journal of the Senate:

Mr. Gellatly presented the following address and resolution:

To His Excellency Richard Coke Governor of the State of Texas:

The House of Representatives of the State of Texas, the Senate concurring therein, do hereby address your Excellency, and would represent that one Martin W. Wheeler, Judge of the Fifth Judicial District, composed of the counties of Panola, Shelby and Sabine, in the State of Texas, is unfit to hold the

office of Judge of the District Court for the following reasons, to-wit:

First. He is unqualified to hold the position of district judge, because he is not possessed of sufficient legal knowledge to discharge the duties of the office and maintain the dignity of the State.

Second. That by reason of real or pretended bodily infirmities the said M. W. Wheeler has failed to hold the regular terms of the district court in any of the counties in his district for the whole of the year A. D. 1873, with the exception of the June term, at Carthage, in Panola county.

Third. That the said M. W. Wheeler has no reason to believe that he will recover his health, so as to be able to discharge the duties of the office of district judge for the future period of his term of office in any better manner than he has done heretofore.

Fourth. That the said Wheeler, with full knowledge of the fact that he would not be in attendance at the times and places prescribed by law for holding the terms of the district courts in the several counties of his district, has invariably represented to those interested that he would at all events hold a term of said court, thereby entailing heavy and unnecessary expense upon the several counties and upon parties litigant in his district.

Fifth. That the interest of the citizens of the Fifth Judicial District demands that a more able and efficient judge be placed upon the bench; that the peace of the State demands it; that the protection of life and property in said district demands the removal of said Wheeler.

Resolved, That the address just read, requesting the removal of Judge Martin W. Wheeler, be referred to the joint special committee of five members of the House and three on the part of the Senate, to which was referred addresses to remove Judges Priest and Cooper, the Senate concurring therein, and that said committee report the proper mode of procedure in such case.

Adopted.

The hour for the special order having arrived, to wit: Senate bill No. 89, "An act to incorporate the Southwestern Railroad Company, and to grant lands to aid in the construction of the same," the same was taken up.

On motion of Senator Ireland, the Senate went into a committee of the whole, to consider said bill.

(Senator Flanagan, Chairman.)

Senator Flanagan rose and reported progress of the committee of the whole, and moved that the first amendment be adopted. Carried.

Senator Ireland moved that all the amendments be adopted. Carried.

The bill as amended was then ordered engrossed.

Senator Dwyer introduced a bill entitled, "An act to grant lands to the International company, in lieu of bonds, on a portion of the line of its road." Read first time, and referred to the Committee on Internal Improvements.

ORDERS OF THE DAY.

House bill, No. 146, "An Act to branch the Supreme Court," was read first time and referred to Committee on State Affairs.

Senator Bradshaw moved that the bill be made special order for Saturday next. Lost.

House bill, No. 133, "An act to enlarge and define the boundaries of Wilson county," was, on motion of Senator Ireland, postponed until Wednesday next.

House concurrent resolution, prescribing rules of procedure in cases of removal of judges or other officers, on address, was read first time.

On motion of Senator Camp, the rules were suspended, concurrent resolution read second time and passed to third reading.

On motion of Senator Westfall, the rules were further suspended, the concurrent resolution read third time and passed.

A message from the House was received announcing that the House has spread upon its journals of this day, the address asking the removal of J. J. Thornton, Judge of the Twenty-fourth Judicial District, and appointed as committee to conduct said proceedings, under said address, to act with a committee of the Senate, Messrs. Storey, Lawhon, McLeary, Swain and O'Neal. Also announcing that an address had this day been spread on the journals of the House, asking the removal of Judge J. B. Williamson, of the Sixth Judicial District; and, also, the passage of a resolution asking that said address be spread on the journals of both houses; and that the said Judge Williamson, who resides in the county of Harrison, in said district, be notified to appear on the twenty-first day of February, 1874, and make his defense to the causes set out in this address; also that the House has appointed a committee to conduct proceedings under said address, said committee being Representatives Goodwin, Rainey, Anderson, Denman and Cochran. The President appointed Senators Ireland, Wood and Erath as the committee on the part of the Senate, to act with the House committee on the address just announced.

House bill No. 6, "An act to ascertain the amount due to the teachers of the public free schools of this State for services rendered as teachers, prior to July 1, A. D. 1873, and to provide for the payment of the same, and regulating verification and disbursement." Read first time and referred to Committee on Education.

On motion of Senator Ball, the Senate adjourned to 10 o'clock A. M. to-morrow.

TWENTY-SIXTH DAY.

SENATE CHAMBER,
AUSTIN, February 13, 1874. }

Senate met pursuant to adjournment. Roll called; quorum present.

Prayer by the chaplain.

Journal of yesterday adopted.

Senator Davenport asked for a further leave of absence for Senator Bradley for two days, on account of sickness. Granted.

Senator Westfall presented a petition for the relief of Daniel A. James. Read and referred to the Committee on State Affairs.

Senator Ireland, chairman Judiciary Committee, submitted the following reports:

Hon. R. B. Hubbard, President of the Senate:

Your committee, to whom was referred Senate bill No. 93, "An act to validate 'An act to encourage stockraising and for the protection of stockraisers,'" have examined and considered the same, and instruct me to report it back, with the printed bill as a substitute, and recommend the passage of said substitute.

IRELAND, Chairman.

Hon. R. B. Hubbard, President of the Senate:

Your Judiciary Committee, to whom was referred Senate bill No. 85, "An act to fix the times and places of holding the Supreme Court," beg leave to report the same back, with the recommendation that it do pass.

IRELAND, Chairman.

Hon. R. B. Hubbard, President of the Senate:

Your committee, to whom was referred Senate bill No. 87, "An act for the relief of the several justices of the peace, of the several counties of this State, for assessing the taxes for the year A. D. 1873," having examined and considered the same, report it back with the recommendation that it do not pass.

All of which is respectfully submitted,

IRELAND, Chairman.

Hon. R. B. Hubbard, President of the Senate:

Your committee, to whom was referred Senate bill No. 87, "An act to refund the one per cent. school tax," beg leave to report the same back, with the recommendation that it do not pass.

IRELAND, Chairman.

Hon. R. B. Hubbard, President of the Senate:

Your committee, to whom was referred Senate bill No. 99, "An act to regulate pawnbrokerage," respectfully report the same back, with the recommendation that it do pass.

IRELAND, Chairman.

Hon. R. B. Hubbard, President of the Senate:

Your committee to whom was referred House bill No. 70, "An act to authorize the appointment of an attorney at law, in certain cases to act as district attorney," instruct me to report the same back, with the recommendation that it do pass.

IRELAND, Chairman.